Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Leased Commercial Access	)	MB Docket No. 07-42
	)	
Development of Competition and Diversity	)	
	)	

To: The Commission

REPLY COMMENTS OF
NATIONAL ALLIANCE FOR MEDIA ARTS AND CULTURE,
CENTER FOR CREATIVE VOICES IN MEDIA,
ALLIANCE FOR COMMUNITY MEDIA,
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,
UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATION, INC.,
NATIONAL HISPANIC MEDIA COALITION,
COMMUNICATIONS WORKERS OF AMERICA, FREE PRESS,
AND
U.S. PIRG

October 15, 2007

SUMMARY

The record in this proceeding speaks clearly. Although the two largest cable operators and the NCTA claim that the system works as Congress intended, programmers actually trying to use the leased access and carriage complaint rules tell a different tale. To effectuate Congress' twin goals of promoting diversity of programming and encouraging vigorous competition in the video programming market, the Commission must make substantial changes to the existing rules.

As an initial matter, the constitutional arguments raised by the cable operators have no merit. The courts have consistently held that – to the extent cable operators have a First Amendment claim in the adjustment of a rate for leased access or in changes in procedures to prevent and adjudicate illegal conduct – the appropriate standard remains intermediate scrutiny. Nor can a leased access regime that compensates a cable operator for its actual costs constitute a "taking" under the Fifth Amendment. Further, as the courts have determined with regard to the Commission's pole attachment determinations, the Commission has broad latitude to consider an appropriate rate of compensation. *See NCTA v. Gulf Power Co.*, 436 U.S. 775, 789 (2002).

As for the cable operator claims that both the leased access and carriage complaint processes function in the manner Congress intended, the record clearly belies this cheerful assessment. To this already extensive record of abusive practices by cable operators to discourage use of leased access programming, NAMAC, *et al.*, submit the attached economic analysis of 54 leased access rate cards by Dr. Gregory Rose. As the Rose Study demonstrates, the rates charged by cable leased access operators do not

correspond to any economic or demographic variables one would expect to find if cable operators based rates on a formula designed to compensate cable operators for assessable actual costs and predictable opportunity costs – as intended by the Commission when it adopted the existing rate formula in 1997. One can only conclude that the rate formula adopted by the Commission has utterly failed in practice to achieve the goals of certainty and affordability intended by Congress, or that cable operators have circumvented the Commission's rules to reenforce the barriers to entry Congress explicitly intended to remove. In either case, the Commission must change the leased access rate system and the rules governing the manner in which cable operators negotiate with would-be programmers to make leased access a "genuine outlet" for independent programming.

The Rose Study also provides empirical support for recommendations NAMAC, *et al.*, submitted in its initial comments. First, as demonstrated by the Rose Study, the additional fees charged by cable operators for services such as tape insertion correspond to no discernible economic variable. They therefore most likely represent monopoly rent seeking and an effort to create further barriers to entry. The Commission should therefore prohibit such fees, and abolish them where previously included in leased access agreements.

Second, the greater availability of digital-tiered leased access rates supports the conclusion that cable operators have sought to push leased access programmers to digital tiers with more limited audiences. What analog leased access data exists likewise supports the conclusion that cable operators have consciously sought to make analog tiers less useable by leased access programmers, despite the fact that the majority of subscribers subscribe only to analog service. As NAMAC, *et al.*, argued in their initial comments, the Commission should address this problem by permitting leased access programmers to demand placement on the tier of its choice.

Third, the practices of the cable operators, including their use of non-disclosure agreements, creates barriers to entry and prevents would-be programmers from effectively pricing leased access or challenging rates as excessive. The Commission must remedy this by requiring cable operators to provide all relevant information necessary for the Commission to ascertain a true cost-based rate. Only the Commission can compel the production of this data, and only by compelling cable operators to produce this data can the Commission set an appropriate rate. As the current situation demonstrates, the attempt to create a rate without mandatory disclosure of information from cable operators creates endless opportunities for cable operators to sabotage the intent of Congress to make leased access a genuine, affordable outlet for programmers.

Alternatively, the Commission can establish a flat rate and permit cable operators to contest the rate by providing the Commission with all necessary cost data, under procedures that would allow the leased access programmer to have the right to any further discovery as may be necessary to demonstrate that the cost data provided by the cable operator artificially inflates the cost of distributing the leased access programming. Based on available data, the Rose Study concludes that the Commission could impose a flat rate of 15 cents per subscriber and still remain confident that this rate overcompensated cable operators rather than subsidized leased access programmers. However, to comply with the statutory purpose of encouraging diversity and competition, and to encourage cable operators to provide the relevant cost data to challenge the rate, the Commission should set the rate even lower. Cable operators that disagree with this rate could challenge application of the rate could submit data to demonstrate their actual costs directly attributable to distributing the leased access programming.

With regard to the carriage complaint process, the Commission can and must consider the empirical studies and direct evidence submitted into the record by independent programmers such as The America Channel, the NFL, Black Television News Channel, and Crown Media (programmer of Hallmark). Rather than obsess about the possibility of frivolous complaints, a concern with no basis in the existing record, the Commission must focus on ways to make the carriage complaint process meaningful and accessible for independent programmers.

As an initial matter, the Commission can eliminate the requirement to establish a *prima facie* case. Nothing in the statute requires this. Nor does the record in any way support the idea that the *prima facie* case requirement is all that prevents would be operators from filing frivolous complaints. Indeed, given that the statute commands only that the regulations "provide penalties to be assessed against any person filing a frivolous complaint," 47 U.S.C. §536(a)(6), and given the evidence that the requirement to establish a *prima facie* case has discouraged programmers from bringing meritorious cases to the Commission, the Commission could substitute a *post hoc* sanction for complaints found to be frivolous rather than require programmers to plead a *prima facie* case to reach discovery. Such a course would also satisfy the statutory command to "provide for expedited review of complaints." 47 U.S.C. §596(a)(4).

With regard to the appropriate standard for adjudicating whether a cable operator has in fact engaged in illegal conduct warranting sanction of carriage, the Commission has broad discretion. As a statutory matter, the Commission may dispense with any requirement to prove a discriminatory or harmful intent. As Section 616(a)(3) states, it is sufficient if the MVPD engages "in conduct the ***effect*** of which is to unreasonably restrain ***the ability*** of an unaffiliated video programming vendor to compete fairly." (Emphasis added). Similarly, the Commission can take into account whether the cable operator generally engages in a pattern of favoring certain types of video programming based on "affiliation or non-affiliation of vendors." Thus, a complainant can satisfy the statutory test of Section 616(a)(3) by demonstrating that a cable operator offers different rates or carriage conditions (or refuses carriage entirely) based on such factors as affiliation with a broadcaster, other cable operator, or prior affiliation with a broadcaster or programmer.[1] This view is reenforced by the legislative history, which indicates that the drafters intended Section 616 to work in

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[1]Although Section 616 refers to MVPDs as well as cable operators, the Commission has considerable discretion to tailor its rules to recognize market realities. When considering application of the rules to DBS providers or overbuilders that have traditionally lacked market power or the regional concentration necessary to engage in anti-competitive conduct, the Commission may rationally decide to consider whether a complainant must show more to demonstrate a genuine anti-competitive effect.

concert with Section 612, Section 613 (channel occupancy limits and horizontal ownership limits) and Section 628 (program access). *See* S. Rep. 102-92, "Cable Television Consumer Protection Act of 1991" ("*Senate Report*") at 23.

With regard to the objections of Time Warner and Comcast to the use of arbitration, the Commission clearly has the flexibility to create its own rules to govern its own proceedings. Nothing prevents the Commission from requiring a duly appointed Administrative Law Judge to resolve rate disputes or carriage disputes using baseball-style arbitration, in the event a party declines the use of private arbitrators. Alternatively, the Commission may hire professional arbitrators to make a recommendation to the Chief of the Media Bureau, provided the Chief of the Media Bureau has the opportunity to accept or reject the arbitrator's findings.[2] The Commission may in such cases prescribe by regulation that the arbitrator's recommendation shall be deemed adopted if the Chief of the Media Bureau fails to act within a reasonable period of time.

Finally, to the extent the Commission has concerns that it lacks necessary statutory authority, the Commission can and should determine that the 70/70 threshold of Section 612(g) has been met. The long overdue recognition that between cable operators, overbuilders, and telephone MVPD providers, more than 70% of the country has access to cable systems with more than 36 activated channels, and that

[2]The Commission would, in such cases, bear the cost of paying for such private sector consulting services.

more than 70% of the residents in areas so served subscribe to these systems, would eliminate any ambiguity as to the Commission's authority to regulate cable systems to protect and enhance diversity.

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Media Access Project (MAP), on behalf of the above listed organizations (collectively "NAMAC, *et al.*"), hereby files these *Reply Comments* in the above-captioned proceeding.

ARGUMENT

The continued insistence of the cable operators that the public has "enough" diversity and that therefore the Commission should do nothing fly in the face of daily reports of the demise of independent programmers.[3] The sale of Oxygen Media to NBC

[3]*See* Shirley Brady, "Will the Last Independent Network Standing . . .," Cable365.net (October 10, 2007), available at: http://www.cable360.net/programming/networks/26059.html

for substantially less than analysts predicted[4] and the inability of the Hallmark Channel to receive revenues commensurate with its rating success[5] are only the latest signs that Commission has failed to properly implement the protections for independent programmers contained in the 1992 Act. Praise for YouTube and other potential platforms for distribution that in no way compete with cable programming should not distract the Commission from the demonstrated need for immediate reform of the leased access and carriage complaint rules.

I. TIME WARNER'S CONSTITUTIONAL ARGUMENTS HAVE NO MERIT.

Time Warner seeks to resurrect previous First Amendment arguments in favor of strict scrutiny and, in a footnote, makes an argument that leased access constitutes an illegal takings. The D.C. Circuit fully considered and decisively rejected these arguments in *Time Warner Entertainment Co., LP v. FCC*, 93 F.3d 957, 969-971 (D.C. Cir. 1996). *See also Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996) (plurality in favor of intermediate scrutiny, with Justice Kennedy in favor of finding no First Amendment interest on the part of the cable operator);

[4] *See* Bill Carter, "NBC Purchases Oxygen Cable TV Network For Women," New York Times (October 10, 2007).

[5] *See Letter of Stephen A. Weiswasser, Counsel for Crown Media, to Marlene Dortch,* October 4, 2007. *See also* Brady, "Last Independent Network" *supra* note 3.

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 684 (1994) (O'Connor, J., dissenting) ("Congress might also conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all").

While strict scrutiny certainly does not apply, it remains unclear whether this proceeding raises a First Amendment issue at all. The proper question is not the constitutionality of leased access or of the carriage complaint proceedings. Rather, this proceeding merely addresses the economic terms on which cable operators will carry leased access programmers. Whether cable operators charge 60 cents a subscriber or six cents a subscriber makes no difference to the basic constitutional principle at issue. Because the courts have already upheld leased access as permissible under the appropriate level of scrutiny, this proceeding regulating the price of access is subject only to rational basis scrutiny. *See Valuevision International, Inc. V. FCC*, 149 F.3d 1204 (D.C. Cir. 1998) (analyzing Commission's leased access pricing under rational basis); *See also Time Warner Entertainment Co., LP v. FCC,* 240 F.3d 1126, 1140 (D.C. Cir. 2001) (regulation controlling attribution subject to rational basis because "the only effect of the rule is to limit the extent of petitioners' investments in a particular class of companies").[6] For similar reasons, modification of the rules and procedures governing determinations of illegal discriminatory acts by cable operators cannot raise First Amendment concerns. *See Turner I*, 512 U.S. at 682 (O'Connor, J., dissenting) ("[i]f

[6]To the extent that tier placement or channel placement may trigger intermediate scrutiny as impinging on the editorial discretion of the cable operator, the record more than adequately supports the changes proposed under the intermediate scrutiny standard.

Congress wants to . . . bar cable operators from preferring programmers in which the operators have an ownership stake, it may do that”).

Finally, in a footnote, Time Warner attempts to argue that a leased access rate that compensates cable operators for their costs nevertheless constitutes an illegal taking. This is plainly an argument without merit. Indeed, as the Supreme Court has held in the context of mandatory pole attachment rates, a “taking” fully supported by cable operators, the Commission has broad power to determine an appropriate rate, especially where the matters presented are “complex and dynamic.” *See NCTA v. Gulf Power Co.*, 436 U.S. 775, 789 (2002).

II. THE RECORD SUPPORTS THE CHANGES RECOMMENDED BY NAMAC, *ET AL.*

NAMAC, *et al.*, proposed in their initial comments a comprehensive list of reforms needed to make leased access the “genuine outlet” for independent programers Congress intended. Adoption of these reforms would create certainty and transparency in the leased access marketplace, as well make available new cable services, such as video on demand (VoD), for delivery of diverse and competitive video programming. This fulfills not only the explicit directive of the leased access provisions, Section 612(a) (“the purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems”), but also the broader public interest goals of the Communications Act, *see* Section 257(b) (defining purposes of Communications Act as including promoting “diversity of media voices” and "vigorous economic competition"), and the broader values of the First Amendment. *See Turner I*, 512 U.S. at 663 ("assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment"); *Accord* O'Connor, J, dissenting at 684 (arguing that mandating leased access would provide a more "narrowly tailored"and therefore permissible means of furthering the goal of promoting diverse programming).

A. The Cable Operators' Efforts To Defend the *Status Quo* Fall Short.

As with the First Amendment analysis, the cable operators' insistence that additional platforms remain available for programming has no relevance to whether the Commission should revise its leased access rules to facilitate wider use or to encourage the development of new types of local, ethnic, or minority programming. As an initial matter, the Commission has repeatedly rejected the efforts of cable operators to broaden the scope of possible competing sources of video programming to include such non-competing platforms as DVD rentals and video streaming. *See*, *e.g.*, *In Re The Commission's Horizontal and Vertical Ownership Limit*, 20 FCCRcd 9374, 9412 (2005). The cable operators offer no reason the Commission should find these arguments more persuasive here than the Commission has found them elsewhere.

Furthermore, the Commission does not face here a question of whether or not to create leased access, where the question of whether other possible means of delivering video programming might arguably have relevance. Rather, the *Notice* seeks information on whether the existing rules meet the explicit statutory goal of Congress "to assure the *widest possible* diversity of information sources are made available to the public *from cable systems*." Section 612(a) (emphasis added). YouTube, video iPods, and even rival MVPDs such as DBS providers, are not cable systems. Nor does the presence of large numbers of programming channels affiliated with a handful of cable or broadcast programmers satisfy Congress' instruction "to assure the widest possible diversity of information sources."

Under the plain language of the statute, the only grounds cable operators could offer in opposition to the reforms suggested by NAMAC and others would be evidence that such reforms would be inconsistent "with growth and development of cable systems," Section 612(a), or that the proposed changes would "adversely effect the operation, financial condition, or market development of the cable system." Section 612(c)(1).[7] Comcast makes an effort to comply with this standard by comparing leased access rates with the advertising rates for television broadcast stations and newspapers in Washington DC and San Francisco. *Comcast Comments* at 19-20. Based on this ludicrous comparison, Comcast argues that leased access rates are already "substantially discounted." From this already untenable premise, Comcast draws the unsupported conclusion that "it is hard to imagine how leased access prices could be reduced any further without creating extraordinary burdens on cable operators." *Id.*

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[7]Congress, of course, did not intend to include growth derived from monopoly or monopsony power. To the extent leased access threatens cable revenues *because* it eliminates cable control over what a subscriber sees and deprives the cable operator of the ability to control access to viewers, such loss of monopoly revenue (and concomitant savings to subscribers) cannot qualify as an "adverse impact" within the meaning of the statute.

It is unnecessary to elaborate on the numerous deficiencies of Comcast's analogy and subsequent reasoning. It is enough to observe that unlike advertising, which is intended to provide revenues that both cover cost and provide net ***profits***, leased access rates should – under the statute – only cover the cable operators ***actual costs*** associated with the distribution of the programming. What the Washington Post or local television stations may charge for advertising does not address the question of what does it cost to distribute the leased access programming on the operator's system. This is a question answered with recourse to direct evidence supplied by cable operators, not ludicrous comparisons with advertising rates in alternate media.

Finally, Comcast argues that encouraging programmers to use the leased access set aside to the limit demanded by Congress would jeopardize other forms of diverse programming and programming services. Comcast Comments at 22-23. Even assuming this were true (and Comcast provides no evidence in support of this proposition), Congress has already made a determination in this matter by creating a statutory set aside based on total system capacity. Section 612(b). By raising this argument, Comcast in essence asks the Commission to reverse the reasoned judgement of Congress in determining what percentage of an operator's system to make available for leased access. Even if the record supported such an approach, the Commission has no authority to create leased access rules deliberately designed to suppress use of leased access capacity.

B. The Record Supports Adopting A Flat Rate, Abolishing Service Fees, and Enhancing Overall Market Transparency.

Contrary to the suggestion of Comcast, determining a rate is not a question of "imagin[ing] how leased access prices could be reduced any further." Rates that adequately compensate cable operators for real costs, flow from requiring cable operators to provide relevant cost data, not from "imagination." Although the Commission requires cable operators to maintain such records for precisely this purpose, see 47 C.F.R. §76.970(i)(5), it has never exercised this authority. As the record demonstrates, however, no other course will provide adequate data for the formulation of a suitable rate for leased access. The Commission must either compel cable operators to provide information needed for the Commission to set a rate, or the Commission must set a rate that gives cable operators a suitable incentive to come forward with the relevant information to avoid undercompensation for actual costs. No less drastic measure can hope to set a fair price for access.

As already documented in the record, cable operators further compound this absence of data by forcing leased access programmers to sign non-disclosure agreements (NDAs) and threatening retaliation if leased access programmers seek to exercise their rights under the rules to demand an audit of costs. Only if the Commission compels cable operators to provide relevant cost data can the Commission set a fair rate that will promote competition and diversity of programming while adequately compensating cable operators for the genuine cost of carriage.

As further evidence that the current rate system does not work, and that the Commission must compel cable operators to provide relevant cost information, NAMAC, *et al.*, submit the attached study by Dr. Gregory Rose analyzing 54 leased access rate cards. As demonstrated by Dr. Rose, the rates cable operators charge for leased access do not correlate to any rational economic factor. Either the Commission's rate setting rules are so vague and indeterminate that they yield widely divergent results for comparable systems and services, or cable operators have systemically violated the Commission's rules, or both.

Certainly the lack of transparency in the market contributes to the wild variance and uncertainty in leased access rates. As a demonstration of the difficulty in obtaining leased access rates, Dr. Rose called 72 cable operators to ask for rate cards. Despite the absolute requirement by the Commission that a cable operator must provide a rate card in response to any inquiry, including an inquiry by telephone, Dr. Rose found 28 cable systems, 25 of them owned by Comcast, declined to provide him with any information and would not take his information to send him a rate card. This experience confirms the experiences of others in the record, who maintain that cable operators refuse to provide relevant information for leased access unless a leased access programmer hires a lawyer and vigorously pursues the matter through a host of delays, refusals to provide necessary information, and other barriers designed to discourage leased access programmers.

The Commission recognized in its *1997 Order* that any delay or difficulty in receiving rate information, even a delay engendered by requiring a leased access programmer to put a request in writing or comply with a specific application process, constituted a significant potential barrier to entry. *1997 Leased Access Final Order*, 12 FCCRcd 5267, 5332-33 (1997). Furthermore, the Senate drafters explained in the

Committee report that they foresaw the transparency and certainty that should flow from the Commission's rules as a critical element necessary in making leased access a "genuine outlet" for programmers. *Senate Report* at 31-32. But, as the Rose Study and the submissions of numerous other parties in this proceeding show, rates for leased access programming are neither transparent nor certain. Nor can the Commission adequately reform the process to provide transparency and certainty without adopting the measures NAMAC, *et al.*, have proposed.

While the Rose Study clearly demonstrates the need to eliminate fees and adopt the transparency enhancing measures proposed by NAMAC, *et al.*, and others, the same lack of information about actual costs of distribution prevent NAMAC, *et al.*, from providing an appropriate cost-based rate. Indeed, given that cable operators often assert a proprietary interest in all information surrounding the architecture and deployment of their specific systems, NAMAC, *et al.*, cannot even determine with certainty what ***are*** the actual expenses relevant to the cost of distribution. Accordingly, it is impossible to fix with certainty a rate that does not overcompensate or undercompensate cable operators for the actual cost of distribution on their systems. Furthermore, cable operators have considerable incentive to resist disclosure of this information. Only the Commission can compel the cable programmers to produce details on their distribution mechanisms and costs in a way that will force them to set reasonable rates.

Existing regulations require cable operators to maintain relevant documents for Commission inspection. 47 C.F.R. §76.970(i)(5). But, to the extent NAMAC, *et al.*, can determine, the Commission has never exercised this power. Nor has the supposed availability of these documents provided the needed transparency for leased access programmers to negotiate fairly. Given the record in this case, the Commission has an obligation to exercise its authority under 47 C.F.R. §76.970(i)(5) and direct cable operators to provide suitable documentation of costs so that the Commission may set an appropriate rate.

As an interim measure, or instead of requiring the Commission to collect costs from multiple cable operators to determine an appropriate rate, the Commission can adopt a single national flat rate for 24/7 use of a leased access channel on a per subscriber basis, prorated for increments less than 24/7. Any cable operator that believes itself undercompensated by the flat rate can file a request with the Commission to adjust the rate based on the cable operator's actual, provable costs associated with the distribution of the leased access programming.

Based on the information available, Dr. Rose provides a recommended flat leased access rate of 15 cents per subscriber for digital tier leased access.[8] Dr. Rose acknowledges that this rate certainly overcompensates the cable operators, but that he can offer no other suggestion due to the paucity of evidence available. The Commission, however, is free to recognize that this rate is constrained by the lack of information and therefore set a lower rate based on the need to create competition and foster diversity and the recognition that the suggested 15 cents per subscriber certainly

[8]Dr. Rose lacked data to estimate a rate for analog tier.

overcompensates cable operators for their actual costs. While Congress commanded the Commission to "assure" that cable operators "provide the widest possible diversity of information sources" through leased access, the actual rate need only be "sufficient to assure that such use will not adversely affect" cable operators. Therefore, to the extent the Commission must balance between assuring that it has set a rate the removes artificial barriers to entry, and risking that the Commission may in some cases marginally undercompensate cable operators, the Commission should favor setting a lower rate.

As useful benchmarks, the Commission should consider the rate cable operators pay for programming. Industry sources set the average rate cable operators par for programming at 15 cents/sub. *See* Brady, "Last Network Standing," *supra* note 3. The NCTA, in a recent filing before the Copyright Office, confirmed the 15 cents per subscriber average. *See Written Statement and Comments of the National Cable & Telecommunications Association*, Library of Congress Section 109 Report to Congress, Docket No. 2007-1 (filed July 2, 2007). Crown Media, owner of the Hallmark Channel, recently submitted evidence that it receives only 3 cents a subscriber. *See Letter of Stephen A. Weiswasser*, *supra* note 4.

In addition, by creating a process by which cable operators can challenge the application of the flat rate to their systems based on the production of relevant cost data, the Commission will avoid any suggestion that a flat rate constitutes an illegal taking. Indeed, setting a flat rate that is more likely than not to undercompensate cable operators to provide suitable incentive for them to come forward with necessary data on the cost of distribution would serve both the statutory purpose of encouraging diverse programming while ensuring that the rate does not adversely affect the cable operator. Given the unfortunate history of the current rules, which demonstrably overcompensate cable operators at the cost of diversity and programming competition, setting a flat rate designed to encourage programmers to use leased access and encourage cable operators to divulge accurate price data appears the appropriate course to satisfy the twin purposes of Section 612.

III. THE COMMISSION SHOULD USE ITS BROAD AUTHORITY TO REGULATE CABLE PROGRAMMING PRACTICES UNDER SECTION 616 TO PROTECT INDEPENDENT PROGRAMMERS THROUGH PROPHYLACTIC REGULATION AND PRESUMPTIONS BASED ON INDUSTRY PRACTICES .

The willingness of independent programmers to break the "code of silence" that has traditionally surrounded the programming world from fear of retaliation and from the broad use of non-disclosure agreements should send a clear message to the Commission. Independent programmers – defined as programmers not affiliated with a cable operator, broadcaster, or programmer formerly affiliated with a cable operator or programmer – face extinction unless the Commission acts quickly. Now, in addition to the statements by industry giants such as Ted Turner[9] and John Malone,[10] the sale of independents such as Oxygen Media, and the collapse of The Black Family Channel,

[9]*See* "Ted Turner Laments Cable Mergers," *Wired*, November 28, 2001; Ted Turner, "My Beef With Big Media," The Washington Monthly, July/August 2004.

[10]*See* Mark Robichaux, "From Darth Vader to Yoda," *Broadcasting & Cable*, April 4, 2005.

the Commission has received detailed submission regarding industry practices from Crown Media Holdings, the NFL, and others. If the Commission has any intention of creating a national programming marketplace in which independents have a chance to reach willing viewers, it must do so immediately in this proceeding.

Although the existing regulations under Section 616 take a deliberately narrow approach, nothing in the statute so constrains the Commission. To the contrary, Section 616 provides the Commission with broad regulatory powers. Given that the national programmers that have filed in this proceeding indicate that they do not believe leased access provides a suitable vehicle for promoting national carriage, the Commission must look to its broad powers under Section 616 to remedy the situation.

A. The Commission Has Broad Powers Under Section 616 To Regulate The Cable Programming Market.

The plain language of Section 616 gives the Commission broad power to create prophylactic regulations and to tailor its adjudicatory proceedings to address the reality of cable operator market power against programmers, including the ability to engage in industry-wide retaliatory conduct. As explained in the statutory findings and legislative history, Congress understood that cable operators exercise control over what programming their subscribers see. This "ownership" of the customer allows cable operators to exercise control over programmers, including an ability to dictate terms of carriage. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, §2(a)(2), (a)(4)-(5); *Senate Report* at 8-9, 23-29. The legislative drafters also clearly understood that acts which produce discriminatory effects can have benign explanations, and that programmers and the Commission might have difficulty establishing whether refusal to carry a programmer in any specific case resulted from an improper effort to exercise market power or from the natural give-and-take of market negotiations. *Senate Report* at 24, 28. While the drafters made clear that Congress intended to foster vigorous arms-length negotiations, they also made clear that Congress expected the Commission to consider evidence of industry practices and market realities. H. Rep. 102-628, "Cable Television Consumer Protection Act of 1992," at 41 ("*House Report*").

Accordingly, the language of the statute gives the Commission broad powers to "establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors." Section 616(a). Within this broad set of economic relationships, the Commission must:

> prevent a multichannel video programming distributor from engaging in conduct ***the effect of which*** is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection of terms or conditions for carriage of video programming provided by such vendors.

Section 616(a)(3) (emphasis added). In other words, to regulate the conduct, the Commission need not find that the operator(s) engaged in the conduct intended to exercise market power. It is sufficient for the Commission to make a determination that the cable operator or the industry generally makes a clear distinction in decisions regard to carriage, rates or terms based solely on affiliation or non-affiliation, and that "the effect of which" distinction unreasonably restrains the ability of an unaffiliated operator "to compete fairly."

Thus, the Commission may consider, as part of the establishment of a *prima facie* case, the sort of broad industry evidence submitted by Crown Media on behalf of the Hallmark Channel, the Black Family Channel, the NFL and The America Channel. As the evidence submitted by these programmers shows, the decisions of cable operators to favor certain classes of programmers (*i.e.*, those affiliated with broadcasters, cable operators, or those formerly affiliated with broadcasters or cable operators) has the effect of unfairly disadvantaging independent programmers to the point where it threatens their very survival.

Nor, to establish discrimination, need an independent programmer show that the cable operator discriminated in favor of its own programming. A decision by a cable operator based on any "affiliation or non-affiliation" violates the plain language of the statute. Thus, the common practice of cable operators to swap programming with each other, with broadcast programmers, or with certain other classes of "independent" programers falls within the statutory authority of the Commission to consider and regulate if necessary to avoid practices that "unfairly" discriminate against independent programmers.

For example, the Commission can consider as evidence in support of a *prima facie* case whether a cable operator carries only programming from particular classes of programmers, or whether other cable operators exclude programming that potentially competes with programming affiliated with another cable operator or other privileged class of programmer.[11] Evidence that the cable operator routinely pays higher rates for bundled programming, for its own programming, or for programming from certain classes of programmers, clearly falls within the type of evidence the Commission can and should consider when determining whether a programmer has demonstrated discrimination. At the least, such practices should constitute proof sufficient to establish a *prima facie* case of discrimination and shift the burden of proof to the cable operator to demonstrate a non-discriminatory explanation for this pattern of behavior.

B. The Commission Should Reverse It's 1993 Determination To Interpret Section 616 Narrowly.

In determining what rules to adopt following passage of the 1993 the Commission deliberately took a restrained approach. Concerned that it lacked information as to the nature of the market and how the market would change in the wake of the 1992 Act, the Commission chose to emphasize the free market aspects of the balance Congress struck when it gave the Commission flexibility. *In re*

[11]As all evidence shows that incumbent cable operators continue to exercise market power in this regard, the Commission need not consider here whether or not to include DBS providers, telephone companies offering video services, or other terrestrial overbuilders in such considerations. Furthermore, particularly in the case of DBS operators, the Commission must consider whether spectrum constraints play a role in the choice of programs carried. Accordingly, if the Commission does consider whether to apply these new rules to all MPVDs, the Commission is justified in creating rules for incumbent cable operators in this proceeding and continuing the question of what (if any) new rules to apply to other MVPDs in a separate rulemaking.

Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Second Report and Order, 9 FCCRcd 2642, 2643 (1993) ("*1993 Section 616 Order*"). Based on the belief that undue regulation would interfere with the "vigorous marketplace negotiations" optimistically anticipated following the 1992 Act, the Commission deliberately limited the scope of its Section 616 procedures to the resolution of individual disputes based on the facts of each specific case. *Id.* at 2648-49.

NAMAC, *et al.*, note that the Commission adopted the requirement to establish a *prima facie* case solely on the basis of its own initiative. Contrary to the argument of the cable operators, nothing in Section 616 requires the Commission to use a *prima facie* case requirement to limit the number of potentially frivolous complaints. To the extent the statute speaks to the need to discourage frivolous complaints, the plain language of Section 616(a)(6) directs the Commission to "provide for appropriate penalties to be assessed against any person filing a frivolous complaint pursuant to this section." This speaks only to *post hoc* penalties for filing frivolous complaints, rather than a requirement that the Commission aggressively seek to weed out potentially frivolous complaints in advance – at the possible cost of discouraging programmers from bringing meritorious complaints.

The Commission is therefore free to eliminate the *prima facie* case requirement entirely, as urge by some independent programmers. Indeed, the evidence in this record and the Commission's experience with the carriage complaint filed by Mid-Atlantic Sports Network in 2005 (in which staff took over one year to determine whether MASN had met its burden to establish a *prima facie* case) strongly suggest that the current *prima facie* case requirement actively prevents the Commission from fulfilling the statutory command to resolve complaints "expeditiously." Section 612(a)(5). Similarly, evidence in the record from independent programmers demonstrates that the *prima facie* case requirement may dissuade independent programmers from bringing genuine complaints due to confusion over the appropriate standard or concern that staff will fail to resolve the question of a *prima facie* case in a timely manner. *See, e.g.*, Comments of The America Channel at 9-10. By contrast, cable operators have produced no evidence whatsoever that elimination of the *prima facie* case requirement will trigger a flood of frivolous complaints, or that the use of *post hoc* penalties for filing frivolous complaints will prove less effective than the existing *prima facie* requirement without imposing unnecessary burdens on complainants or discouraging programmers from bringing meritorious claims.

Fifteen years after the Commission adopted the existing rules under Section 616, the marketplace realities demonstrate the need for a broader approach. Study after study confirms that cable operators continue to favor programming affiliated with cable operators, broadcasters, and other large programming conglomerates to the detriment of independent programmers. Where independent programmers do secure carriage, they do so on terms that cannot provide long-term viability.

Based on the evidence presented in this proceeding, the Commission can revisit the decisions it made in 1993 and readjust the rules to achieve the goals of competition and diversity intended by Congress. The evidence demonstrates that the Commission must use the broad authority given it by Congress in Section 616 to create the vibrant programming market that Congress envisioned would emerge from the 1992 Act.

IV. THE COMMISSION MAY CREATE PROCEDURES THAT PARALLEL ARBITRATION.

The cable operators raise significant objections to the mandatory use of arbitration and other alternative dispute resolution procedures. The Commission may, however, achieve the benefits of arbitration without running afoul of federal law. In the case of leased access in particular, this is appropriate. As the House Report explains, expensive, cumbersome, and lengthy enforcement proceedings create a significant deterrent to use of leased access. *See House Report* at 41.

As an initial matter, the Commission has freedom to set the procedures under which its decision makers will operate, and limit the determinations that the Administrative Law Judge will make. The Commission is free to dispense with the need for staff to make an initial determination and refer the case directly to an ALJ constrained to operate under rules and procedures similar to those used by private arbitration associations. The Commission can similarly limit an ALJ in a rate setting case to engage in "baseball style arbitration" and chose between the terms offered by the parties.

Alternatively, federal law does not prevent the use of private arbitrators, consultants, magistrates or other private parties provided that the decisions are advisory and a government official retains final decisionmaking authority.[12] The

[12]The government, of course, would bear the cost of such private sector services.

Commission can therefore require use of arbitration subject to review by the Chief of the Media Bureau. The Commission can also declare by rule that, absent a determination by the Chief of the Media Bureau within 30 days of the arbitrator's decision, the decision is deemed adopted by the Chief of the Media Bureau and effective as a matter of law. The Commission can further declare by rule a party may then appeal to the full Commission, and the appeal deemed denied if not granted within a set period of time.

Either of these two alternatives permits the Commission to establish rules for expedited resolution of complaints, as required by Section 616(a)(5), while respecting the limits imposed on federal agencies by the Alternative Dispute Resolution Act. The Commission can still retain voluntary ADR for parties that wish to use it, while providing similar benefits for those that do not wish to use it.

V. THE COMMISSION SHOULD RESOLVE THE OUTSTANDING PROCEEDINGS ON SECTION 612(g).

Finally, to the extent the Commission remains uncertain as to the scope of its authority to adopt the necessary regulations, it should move expeditiously to find that the conditions of Section 612(g), known as the "70/70 Test," have been met. The Commission has collected ample evidence on this issue in MB Docket No. 05-255.

Under the terms of Section 612(g), the Commission "may promulgate any additional rules necessary to provide diversity of information sources." Even if the Commission construes this subsection narrowly to apply exclusively to leased access programming (an interpretation that conflicts with the plain language of the statute, *see Comments of AIVF, et al.*, MB Docket No. 05-255, at 13-17 (filed April 13-17, 2006)), a finding that the terms of Section 612(g) apply would resolve any question of the Commission's ability to adopt the rate setting and transparency enhancing mechanisms advocated by NAMAC, *et al.* Given the considerable evidence already collected by the Commission on this question, the Commission should find that the preconditions of Section 612(g) are met and issue regulations as proposed by Commentors here to promote diversity of information sources.

CONCLUSION

Within the last few months, the Commission has seen the demise of the last independent minority-owned cable network and the sale of the last independent women-owned network – the later for half a billion dollars less than analysts anticipated. The Hallmark Channel, the most popular independent channel remaining, receives only 3 cents a subscriber – approximately five times less than the industry average. No amount of reassurance from cable operators can disguise the fact that independent programming for cable faces a crisis which only the Commission has the power to cure. Adopting the modifications to the leased access and carriage complaint procedures recommended by NAMAC, *et al.*, and others in this docket would provide the first, important step to resuscitate independent programming and create the vibrant and competitive market in programming Congress intended when it vested the Commission with broad powers under the 1992 Cable Act.

Respectfully submitted,

_____/s/____________

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